



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms B J Blythe

v

Playground Facilities Ltd

Heard at: Watford, by CVP

On: 16 December 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr P O'Callaghan, of counsel

For the Respondent: Mr J Shepherd, Managing Director

RESERVED JUDGMENT

The claimant's claim for unpaid commission succeeds in part. She is entitled to £6,659.33 by way of unpaid commission gross, i.e. before the deduction at source (as required by the Income Tax (Pay as you Earn) Regulations 2003, SI 2003/2682 as amended) of income tax and national insurance contributions.

REASONS

The claim and the issues

- 1 This is a claim for commission which it is said was owed by the respondent to the claimant on 29 August 2019, when the respondent terminated the claimant's contract of employment. The claimant was employed by the respondent as from 1 September 2018. The claimant was employed by the respondent as a Sales Manager. The respondent company operates a small business, which at the time of the claimant's employment had (as I found: see paragraph 5 below) 4 employees including the claimant. One of those employees was Mr Jason Shepherd, who was the Managing Director of the respondent.

- 2 The claimant was offered employment in a letter of which there was a copy at pages C48-C50 (i.e. pages 48-50 of the claimant's bundle; any reference below to a page with the letter prefix C is a reference to a page of that bundle). The letter included the statement that the claimant would receive:

“Commission - 5% of all sales generated by you. Sales generated by other employees will not form part of your commission.”

- 3 The issues for me to determine were (1) what was the proper interpretation of those words; and (2) what was the result of the application of that proper interpretation to the facts, i.e. was the claimant entitled to any unpaid commission, and if so how much?

The evidence before me

- 4 I heard oral evidence from the claimant and from Mr Shepherd. Two bundles of documents were put before me: the parties were unable to agree a bundle in advance of the hearing. I have referred already to the claimant's bundle. That had in it 266 pages not including its index, but including the claimant's witness statements and several other documents in effect stating the claimant's evidence on material matters. The respondent's bundle contained some duplication, but it had in it 310 numbered pages including Mr Shepherd's witness statement and a number of further documents in an Appendix 8 concerning “Disputed Projects”.

My findings of fact

The respondent and its business

- 5 The respondent is a company which was bought by Mr Shepherd as (as he put it in paragraph 2 of his witness statement) “a retirement sale”. He said (and I accepted) that he was not, before he bought the company a specialist in the provision of playground facilities, although he had before his retirement been employed “in construction”. His witness statement contained the following passage, which I accepted:

‘2.0. We purchased Playground Facilities Limited (“the Company”) in October 2016 as a retirement sale. The Company had been wound down and in essence we purchased the customer relations contact database. At this point it was myself and my son, Alex, with me managing the office and working on site with Alex as relationships were built and projects secured. We brought it as a family business and to date, we are a team of 6 people.

- 2.1. The Company offer services for the design, supply, installation and maintenance of playgrounds, skate parks and outdoor gym equipment.
- 3.0. Due to the competitive nature of our sector the Company works on low margins and prompt payment. We hold low cash reserves, which as you can appreciate have been impacted by the current Covid crisis.
- 3.1. We work from a converted garage and have the use of a small barn on a local farm for storage.
- 4.0. The generation of sales by our Sales Managers are critical for the business survival. In 2018, I was the main point of contact for sales and operational activities within the business. We did not have a full time back office function, this was principally my role. For the business to continue operating we needed a sales manager to support me and ensure the business remained viable. At this point the Company increased the staff number to 4, including myself and Alex.'

The manner in which the claimant came to be employed by the respondent

- 6 After a further paragraph, to which it is not necessary to refer here, Mr Shepherd's witness statement continued:

"5.0. At the initial interview with Ms Blythe on the 18th July 2018 it was made clear that a level of turnover was required in order to sustain the business overhead and the Sales Manager role. It was stated that a turnover of £1million was required (subsequently a sales projection report was requested by myself to Ms Blythe in email dated 6 September 2018 and her response of 6 September 2018 (attached at Appendix 5 page 53 and 63 No 5(i) and Appendix 6 page 74 of the PFL bundle).

5.1. Ms Blythe explained that she had been in the industry for a number of years, was a very experienced sales manager, and had a number of existing customers that she would introduce to the Company. At this point Ms Blythe was very confident that she would generate the required order intake to hit the agreed target of £1 million. (attached at Appendix 6 pages 63 and 74 of PFL bundle)

5.2. It was explained to Ms Blythe that as there was only 4 employees in the business, she would be the sole sales person and would be required to bring in the majority of leads to allow me to focus on the other areas of the business.

- 6.0. It was made expressly clear that leads from other parties would be forwarded to Ms Blythe and as part of her basic salary she would manage the sales process, although these leads would not form part of her commission payments.
- 7.0. It was explained that to pay commission on these leads would put pressure on the business cashflow as the current gross Turnover was £780,000 and our cash reserves were extremely low, reporting a loss of £14,343 as evidenced by our end of year accounts (attached at Appendix 7, page 74).
- 7.1. Ms Blythe was agreeable to this as she saw the role as a long-term position and she was positive that her own leads would outstrip those supplied to her. She stated that she was not unduly motivated by money.
- 8.0. At the meeting a basic salary of £30,000 per annum was offered to Ms Blythe. It was also explained that the company offered other incentives such as a company car or car allowance and private healthcare. Ms Blythe asked for a £7,000 car allowance which was agreed. Her role was to manage the sales function of the Company and this would include reporting on all opportunities, not just those that were generated by her.”
- 7 While the claimant wrote a witness statement in response to Mr Shepherd’s witness statement, she did not respond to those passages. She responded instead to the details of the various projects in respect of which Mr Shepherd said no commission was payable.
- 8 The claimant when giving oral evidence vigorously resisted the proposition that she and Mr Shepherd had had a conversation to the effect stated in paragraphs 5.2 to 7.1 inclusive of Mr Shepherd’s witness statement.
- 9 Mr Shepherd said in oral evidence, in answer to a question from me, that the profit margin, before meeting overheads (which included salaries and equipment costs) on the projects for which the respondent tendered successfully, was usually in the region of 20%. He also said that at the time that the claimant was interviewed, the respondent’s turnover was approximately £660,000. I noted that the latter evidence was not wholly consistent with paragraph 7.0 of Mr Shepherd’s witness statement, which I have set out above, but that that paragraph (7.0) was plainly written by reference to the whole of the respondent’s financial year, which included a period after the claimant was taken on. Having heard and seen him give evidence, I concluded on the balance of probabilities that what Mr Shepherd said as recorded in the first two sentences of this paragraph, was true.

- 10 In addition, Mr Shepherd said in cross-examination that “in order to sustain [the claimant’s] salary and pay her 5% commission we would need a turnover of about £1million a year”. I accepted that oral evidence of Mr Shepherd also.
- 11 Thus, I concluded that at the time of the claimant’s interview with Mr Shepherd on 18 July 2018, the respondent was making profit before overheads of approximately £132,000 per year and that there were equipment costs as well as salaries to be paid out of that £132,000. Employing the claimant on a salary of £37,000 per year was therefore going to be a burden on the respondent unless the claimant was able to generate significant new income. If she generated turnover of £340,000, then the respondent’s turnover would hit the intended target of £1 million. If she received 5% of that additional turnover as commission, then she would earn £17,000 by way of commission. If she did not generate any significant increase in turnover, then she would just be a burden on the respondent unless she freed Mr Shepherd’s time up sufficiently for him to find new work for the respondent.
- 12 As for the question of whether or not the claimant and Ms Shepherd discussed the generation of “leads”, I concluded that they did. That is in part because it is entirely to be expected in a conversation of the sort that the parties had before the claimant was offered the contract including the words set out in paragraph 2 above that they would discuss the generation of leads. That in itself weighed heavily in the balance of probabilities. In addition, that discussion took place against the background that the parties were both hoping to achieve an increase in the respondent’s turnover, and I concluded that it was at least likely that the claimant and Mr Shepherd were both envisaging that increase coming from the claimant’s industry background and contacts. That is not least because Mr Shepherd’s own background was “in construction” and not specifically the building of playground facilities, whereas the claimant’s expertise was in the building of playground facilities, and she was employed in part specifically because she had that expertise and relevant contacts.
- 13 Given those factors, but also having heard and seen the parties give evidence, I accepted the thrust of Mr Shepherd’s evidence in paragraphs 5.0 to 8.0 inclusive, which I have set out in paragraph 6 above: it was consistent with the background facts as I have found them to be and it was in my judgment on the balance of probabilities accurate in large part. However, I concluded that paragraphs 6.0 and 7.0 were not wholly accurate: I found them to have been written with the benefit of hindsight, and that Mr Shepherd’s memory of what was said was coloured by the subsequent development of the situation which led to this hearing. I acquit Mr Shepherd entirely of any intention to mislead in this regard. I concluded that what was made clear to the claimant was that she would need to be instrumental (i.e. principally responsible) for increasing the turnover of the respondent, and that to the extent that she could show that she had been so instrumental in procuring any particular project, then she would receive as commission 5% of the turnover resulting from that project.

The commission claimed by the claimant and the respondent's response to that claim if I found that there was no requirement for the leads to have been brought in by the claimant

- 14 The claimant did not claim to be entitled to 5% commission on all of the respondent's turnover after she started to be employed by the respondent: only on the parts of the turnover which she had in her view generated. At the start of the hearing and again when he started to give evidence, Mr Shepherd said that the respondent accepted that the claimant had done the majority of the work on some of the 10 projects in respect of which she now claimed commission. Mr Shepherd said that the respondent accepted that if the claimant did not need to have been responsible for introducing a customer to the respondent for her to be entitled to the payment of commission, but merely to have done the majority of the work in the course of procuring the contract to do it, then she was entitled to payment of 5% commission on all but three of the projects in respect of which she was claiming commission. Mr Shepherd said that he accepted that the claimant was entitled, on that (provisional) basis to be paid £6,659.33.

The manner in which the contract was operated by the respondent

- 15 During the course of the claimant's employment with the respondent, she submitted to Mr Shepherd a claim for the payment of commission, and he paid it, but with a slight deduction in the amount she claimed. The claim was stated in the document at page C115 and the payment summary was at page C117. The former was enclosed with the email from the claimant in the middle of page C116, which was so far as relevant in these terms:

"Also, regarding my Sales Commission I have reviewed the last years orders and commission due/paid, which I have summarised in the table attached.

Could you review it and confirm the figures please ?"

- 16 The document at page C117 was enclosed with the email from Mr Shepherd to the claimant immediately above that of the claimant on page C116 which I have set out in the preceding paragraph above. Mr Shepherd's email said simply this:

"Hi June

Please find attached your commission statement to date.

Kind regards

Jason".

- 17 Mr Shepherd's evidence on this was in paragraphs 13.0 to 14.1 inclusive of his witness statement, which were as follows:

“13.0 Commission summary documents were always prepared by Ms Blythe. At this time, because of the long hours I was working and being out on site, I acted in good faith towards Ms Blythe, believing the information that she was sharing with me was correct at that time. My scrutiny of these documents and the sales reports was not as thorough as it should have been, and this was my mistake. I was struggling to do two jobs at this time, and my key priority was to ensure we were installing playgrounds and Ms Blythe generating leads.

13.1. Ms Blythe regularly submitted a Commission Summary to me and have attached emails and summary sheets dated 17th March 2019 and 14th June 2019 which supports this at Appendix 5, pages 52.1, 52.2, 52.3, 52.4 and 52.5 of PFL bundle).

14.0. At the time of submissions, I was out on-site installing playgrounds, whilst attempting to manage operational functions and didn't devote the attention to the summary that I should have, in hindsight. I trusted that Ms Blythe had only placed Orders on the sheet that she was entitled too [sic] in good faith. My scrutiny of these documents and the sales reports was not as thorough as it should have been and this was my mistake. The payments were made in error as most of these leads were from myself (commission summary attached at Appendix 5, page 54 and Appendix 2 Section F of JB's bundle).

14.1. In my solicitor's letter of 23 October 2019 it stated at paragraph 1.7. that we made payment in the mistaken belief that the contract provided for it. (attached at Appendix 2, pages 27-31 of PFL bundle). What is meant by that is that we made payment in the mistaken belief that sales were generated by Ms Blythe via her own leads and was, therefore, contractually entitled to payment, but such payments were in fact made by mistake/error as Ms Blythe did not generate the sales in question from her own leads. This was not made as clear as it should have in the letter.”

18 In fact, the document at page C115 in which the claimant claimed the commission stated nothing more than that the commission was due. Thus, Mr Shepherd might well have simply taken what the claimant said in that document at face value and approved the payments on a trusting basis. However, a close scrutiny of the documents at pages C115 and C117 showed that Mr Shepherd had plainly undertaken a reasonably careful scrutiny of the claim. That was evident because the figures in the two documents differed in some respects, as did the descriptions of the projects to which the claims and payments related. Given those factors, I concluded that Mr Shepherd approved those payments because he genuinely thought (after a more than cursory analysis of them) that they were due to the claimant.

The projects in respect of which the parties differed

- 19 The projects in respect of which the respondent contended that, in any event, i.e. even if I found that the claimant did not need to have introduced a “lead” to be entitled to 5% commission, the claimant was not entitled to commission, were dealt with by the claimant in the document at pages 108-111. The disputed projects were those numbered 7, 8 and 10 at pages 110-111. I refer to them here as “Myton Green”, “Newfoundland” and “Westmill”.
- 20 The largest of those was the Myton Green project. It concerned the provision of eight separate play areas in a large country park. There was an overall contract for the project relating to that country park, and it was won by a company called Montell. The respondent’s contract for the provision of the play areas was entered into with Montell. Mr Shepherd said (and I accepted) that the claimant’s main involvement in the project for the eight play areas was in regard to what was called a “MUGA” only, and the majority of the work done in securing that project was done by him and not the claimant.
- 21 Equally, I accepted Mr Shepherd’s evidence (including by reference to the documents at pages R159-R195) that the Newfoundland project (which was to provide a play area on the second floor of a tower block in Canary Wharf) was won largely by him, although the claimant assisted him in winning it.
- 22 I also accepted Mr Shepherd’s evidence about the Westmill project, which included the documents at pages R257-R282. That was to the effect that he and not the claimant was principally responsible for the procuring of that project for the respondent. The facts that
- 22.1 the project was the subject of initial discussions involving Mr Shepherd in April 2017,
- 22.2 the project was not procured as a firm order until after planning approval was given for it, and
- 22.3 planning approval for it was given only in 2020,
- supported strongly Mr Shepherd’s oral evidence in that regard.

A discussion

- 23 One thing was clear to me, and that was that the terms of the contract here had to be interpreted against the background of the factual matrix which existed at the time of the entering into of the contract. In addition, it was possible (i.e. if appropriate) to take into account the manner in which the parties had actually operated the contract in deciding what they had meant by the words used in it:

that was clear from the case of *Carmichael v National Power plc* [1999] ICR 1226.

24 Mr O’Callaghan referred to no case law in his closing submissions. I myself could find nothing directly relevant. It seemed to me, as I said to the parties during the hearing, that

24.1 I could interpret the words set out in paragraph 2 above in the light of the factual matrix as meaning that it was only if a lead was introduced by the claimant that she was entitled to 5% commission on the turnover generated by that lead;

24.2 alternatively, I could conclude that it was a matter for the respondent to decide whether or not the claimant had “generated” a sale, and it was possible for a court or tribunal only to see whether that decision was made in good faith and (applying by analogy the principles in the case law relating to the exercise of a discretion concerning remuneration, including *Hills v Niksun Inc* [2016] EWCA Civ 115, [2016] IRLR 71) intervene only if the discretion was exercised in breach of (a) the principles applicable in a public law claim and/or (b) the implied term of trust and confidence; or

24.3 I could conclude that it was a matter for a court or tribunal, applying an objective approach to the interpretation of the words “sales generated”, to decide whether or not a particular sale was generated by the claimant.

25 One common law principle that Mr O’Callaghan relied on which seemed to me to be applicable here was that which is known as the “contra proferentem” principle, which applied to the context of a claim against an employer in the law of contract is that if there is an ambiguity in a document drafted by the employer, then the ambiguity is to be resolved in favour of the employee.

My conclusions

26 I came to the following conclusions.

27 I concluded that the words “sales generated” did not mean “sales resulting from leads procured by”. That is for the following reasons.

27.1 In the context of the small business of the respondent, in July 2018 the respondent and the claimant must have accepted that what was going to lead to the procuring of a project or contract for work to be done by the respondent was likely to be a series of actions which would be taken by both the claimant and in particular (but not only) Mr Shepherd.

27.2 Leads could come from a number of sources, including website queries from parties who were known by neither Mr Shepherd nor the claimant. However, if the claimant was mainly responsible (by doing the majority of

the work in order to procure it) for winning a contract to provide work resulting from that lead, then it would be fair and reasonable for her to be paid commission on the turnover resulting from obtaining the contract.

27.3 If and to the extent that there was any ambiguity in the wording of the term set out in paragraph 2 above, then that ambiguity should be resolved in favour of the claimant.

27.4 The fact that Mr Shepherd had himself operated the contract on the basis claimed by the claimant supported the proposition that the claimant's interpretation of it was right.

28 As for the application of the words "sales generated" to the facts of the case, I accepted Mr Shepherd's evidence that the claimant had not been responsible for the generation of the sales referred to in paragraphs 19-22 above, i.e. applying the interpretation of the words "sales generated" in the manner contended for by the claimant and accepted by me. However, in regard to the rest of the projects in relation to which the claimant claimed commission, the fact (accepted by Mr Shepherd) that the claimant had done the majority of the work to win them meant that she was to be regarded as having "generated" the turnover resulting from them and was therefore entitled to 5% commission on the turnover which resulted from the respondent's work on them.

29 I therefore concluded that the claim was well-founded to the extent that the respondent owes and must pay the claimant the sum accepted by Mr Shepherd to be payable in the event that I found in favour of the claimant on the issue of the interpretation of the words set out in paragraph 2 above. That is the sum of £6,659.33. That sum will need to be paid under the Income Tax (Pay as you Earn) Regulations 2003, SI 2003/2682 as amended), so that income tax and national insurance contributions will need to be deducted at source from it by the respondent.

Employment Judge Hyams
Date: 18 December 2020

Sent to the parties on:

30/12/2020

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T Henry-Yeo

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For Secretary of the Tribunals